Filed 9/23/02 In re Jacob S. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re JACOB S., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. JACOB S., Appellant.	C040039 (Super. Ct. No. JD217214)

Jacob S. (the minor) appeals from the juvenile court's order granting his biological father, Reid Whitney S., presumed father status and ordering reunification services. (Welf. & Inst. Code, § 395; further section references are to this code unless otherwise specified.) Finding that Reid Whitney S. (father) failed to establish one of the foundational facts necessary for presumed father status, we shall reverse the order and remand the matter for

a new dispositional hearing to allow him to present evidence necessary to establish the foundation for presumed father status.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2000, the two-month-old minor was placed in protective custody and a dependency petition was filed alleging, among other things, that the minor's mother and father had been arrested for drug-related offenses. At the detention hearing, the father questioned his paternity and requested blood testing.

The petition was sustained. In the dispositional report, the social worker noted that the father did not want to pursue reunification services unless it was determined that he is the biological father of the minor. In November 2000, the juvenile court adopted a case plan for the mother only.

According to the report for six-month review hearing, the social worker had not received the paternity test results; however, she had been told by the father that they confirmed his paternity. On receiving the test results, the father said that he wanted to do whatever was necessary to gain custody of the minor. When he met with the social worker, the father was told that he could not be provided a service plan "at that time," but was given information about how to contact various service providers on his own. He met with a substance abuse counselor for an assessment and submitted to drug testing, which produced a positive result for methamphetamine.

At the six-month review hearing in May 2001, the juvenile court "terminated" reunification services and set a section 366.26 hearing to select and implement a permanent plan for the minor.

The father filed a petition for extraordinary writ (Cal. Rules of Court, rule 39.1B), seeking to vacate the court's order.

While his petition for extraordinary writ was pending, the father lived in a "'clean and sober' facilit[y]" and visited the minor regularly. Meanwhile, the minor was living with his paternal grandparents, who were willing to adopt him. The test results establishing the father's paternity were attached to the social worker's report for the section 366.26 hearing.

This court granted the father's petition for extraordinary writ and vacated the section 366.26 hearing, remanding the matter for a hearing to determine if the father's paternity had been established and, if so, whether the minor would benefit from reunification services with him pursuant to section 361.5, subdivision (a). (*Reid S. v. Superior Court* (July 19, 2001, C038346) [nonpub. opn.].)

In August 2001, the minor's dependency proceeding was transferred to Sacramento County, where his parents were residing. By then, the father had participated in a 30-day residential treatment program and had submitted several negative drug tests. The social worker recommended that reunification services be offered to the father.

In a supplemental pretrial statement, the father expressed his intent to offer into evidence a notarized declaration of paternity signed by the mother and the father. A copy of the declaration of paternity was attached to the supplemental pretrial statement.

At the hearing to determine whether the father should be provided reunification services, the father's attorney sought to

enter into evidence the declaration of paternity to establish that the father was the minor's presumed father. The minor's attorney would not stipulate to admission of the declaration of paternity, arguing that "an adequate foundation ha[d] [not] been laid" because the declaration had to be filed with the Department of Child Support Services. The minor's attorney also objected to the declaration as untimely.

The father's attorney acknowledged he did not have proof that the declaration of paternity had been filed with the Department of Child Support Services, but stated the declaration had been notarized and mailed.

Acknowledging the absence of evidence that the declaration of paternity had been filed with the Department of Child Support Services, and noting that the father was not a presumed father under any other provision, the juvenile court held the declaration of paternity was "an indication and evidence of . . . the dad's presumed father status" and, thus, established the father as the minor's presumed father. The minor's attorney conceded that, as a presumed father, the minor's father would be entitled to reunification services, and the juvenile court ordered services for the father.

DISCUSSION

I

The minor argues that his due process rights were violated by the juvenile court's failure to hold "an appropriate evidentiary hearing" to determine paternity and decide whether to provide reunification services to the father. The problem with the minor's

argument is that his attorney did not seek to present evidence or cross-examine witnesses at the hearing.

In response to the juvenile court's statement that the minor was contesting the recommendation for reunification services, the minor's attorney said that she had "initially indicated [she] was prepared to argue the matter," she did not "think that the department has met [its] burden," and she was "prepared to proceed." When the father's attorney then sought to enter into evidence the voluntary declaration of paternity, the minor's attorney objected to its introduction and argued that the father should not be granted presumed father status on several bases. The minor's attorney was given ample opportunity to address the juvenile court, yet made no request to cross-examine witnesses or to present her own witnesses or evidence. Thus, it is apparent that the minor's attorney intended only to present argument.

It is common in dependency proceedings for contested hearings to proceed without the presentation of witnesses because the social worker's report, which is admissible as evidence (§ 281; *In re Malinda S.* (1990) 51 Cal.3d 368, 376; *In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1571-1573), often contains sufficient information for the parties to assert their positions. Due process requires only that the parties be given an *opportunity* to be heard. Hence, the juvenile court is not required to hold an evidentiary hearing in the absence of a request from a party to present evidence.

The cases cited by the minor are distinguishable because, in each case, the appellate due process argument was preceded by a rejected request in juvenile court to present testimony or

cross-examine witnesses. (See *Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751; *In re Matthew P.* (1999) 71 Cal.App.4th 841; *In re James Q.* (2000) 81 Cal.App.4th 255.)

Here, the minor's attorney had an opportunity to be heard and did not request to present witnesses or evidence. Thus, there is no merit in the minor's claim that the juvenile court denied him an evidentiary hearing.

II

Next, the minor argues that section 361.5, subdivision (a), as applied here, violated his right to substantive due process because it denied him a prompt resolution of his custody status and interfered with his relationship with his de facto parent. Again, the minor's silence in this regard in juvenile court forecloses relief on appeal.

The minor did not proffer the constitutional argument in the juvenile court, even though he had the opportunity to so do. "In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived and may not be raised for the first time on appeal." (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) That rule extends to constitutional claims. (Cf. *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Since the minor had ample opportunity to tender this argument during the juvenile court proceedings but failed to do so, he may not raise it for the first time in this appeal.

The minor did argue in juvenile court that the voluntary declaration of paternity was not "timely," an argument that is

echoed in support of his due process argument on appeal. This contention bears brief mention.

The hearing at which the father requested presumed father status was a dispositional hearing, at which the juvenile court was to consider whether to grant the father reunification services. The delay in holding the father's dispositional hearing was caused by a number of factors -- the father's filing of an extraordinary writ to compel the juvenile court to consider granting services; the decision by the Sutter County Juvenile Court, unopposed by counsel, to transfer the matter to Sacramento County; and several continuances of the matter once it was transferred to Sacramento County, including a continuance requested by the minor. The record before us does not reflect that any of the continuances were caused by the father or opposed by the minor. Thus, we agree with the juvenile court that this was not a situation of a "father come lately" who stepped into the proceedings at the eleventh hour to hold up termination of parental rights; rather, it involved a father who had been attempting to obtain reunification services ever since his paternity was established.

We acknowledge that there may be situations in which a father's attempt to establish presumed father status comes too late in the dependency proceedings to permit commencement of the reunification process with that parent. (Cf. *In re Zacharia D.* (1993) 6 Cal.4th 435.) Here, however, the dispositional hearing regarding whether the father should be granted services was still pending in this case. Accordingly, the father's attempt to show that he is the minor's presumed father was not untimely.

III

Lastly, the minor contends that, because the record fails to establish that the voluntary declaration of paternity had been filed with the Department of Child Support Services, there was insufficient evidence to support the juvenile court's finding that the father is the minor's presumed father. This argument is meritorious.

Section 361.5, subdivision (a) provides in pertinent part: "[W]henever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians." Biological fathers are entitled to reunification services only if the juvenile court determines that services will benefit the child. (Welf. & Inst. Code, § 361.5, subd. (a).)

"In order to become a 'presumed' father, a man must fall within one of several categories enumerated in Family Code section 7611." (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.) One of the ways in which a man can establish presumed father status pursuant to Family Code section 7611 is "if he meets the conditions provided in . . . Chapter 3 (commencing with [Family Code] Section 7570) of Part 2 . . . ." Family Code section 7570, and the sections that follow it, address the establishment of paternity by voluntary declaration.

Family Code section 7571, subdivision (a), specifies the procedure for completing a voluntary declaration of paternity at the time of a child's birth. Under this procedure, "[s]taff in

the hospital shall witness the signatures of parents signing a voluntary declaration of paternity and shall forward the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed." (Fam. Code, § 7571, subd. (a).)

Subdivision (d) of Family Code section 7571 provides an alternate procedure when the declaration of paternity is not completed at the hospital: "If the declaration is not registered by the person responsible for registering live births at the hospital, it may be completed by the attesting parents, notarized, and mailed to the Department of Child Support Services at any time after the child's birth."

The voluntary declaration of paternity must be "executed on a form developed by the Department of Child Support Services" and must contain the names of the parents and the child, the parents' signatures, the child's date of birth, and a statement by each parent that they have read and understood the material accompanying the form, that the man signing the form is the child's father, and that the parents consent to the establishment of paternity. (Fam. Code, § 7574, subds. (a) and (b)(1)–(6).) Additionally, the form must be signed by a person who witnessed the parents' signatures on the declaration. (Fam. Code, § 7574, subd. (b)(7).)

With exceptions not applicable here, "a completed voluntary declaration of paternity, as described in [Family Code] Section 7574, that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by

a court of competent jurisdiction. . . . " (Fam. Code, § 7573.) "[A] voluntary declaration of paternity that is in compliance with all the requirements of [Family Code] section 7570 et seq. . . . entitles the father to presumed father status in dependency proceedings." (*In re Liam L.* (2000) 84 Cal.App.4th 739, 747; see also *In re Raphael P.* (2002) 97 Cal.App.4th 716, 722-723.)

Here, the juvenile court had before it a notarized California Department of Child Support Services form entitled "Declaration of Paternity," which was signed by both parents and contained all of the information required under Family Code section 7574. And the father's attorney represented to the court that the form had been mailed to the Department of Child Support Services.

Although the form appears to comply with all of the statutory requirements, we are constrained to agree with the minor that there was no evidence before the juvenile court that the form was filed with the Department of Child Support Services. The juvenile court acknowledged this during the hearing.

Evidence that the declaration of paternity has been filed with the Department of Child Support Services is a foundational requirement for establishing presumed father status under Family Code section 7573. It was the father's burden to establish by a preponderance of evidence the foundational facts showing that he falls within one of the statutory definitions of a presumed father. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653.) The father did not satisfy his burden of proof. Therefore, the juvenile court erred in concluding that it could find the father to be the minor's presumed father under Family Code section 7570

et seq. when the father had not established that he met all of the statutory requirements.

DISPOSITION

The juvenile court's finding that the father is the minor's presumed father is reversed, and the matter is remanded for a new dispositional hearing. If, at the new hearing, evidence shows that a voluntary declaration of paternity in compliance with the requirements of Family Code section 7570 et seq. has been filed with the Department of Child Support Services, the juvenile court shall reinstate its finding that the father is the minor's presumed father. If the father fails to present such evidence and does not show by a preponderance of evidence that he is a presumed father within any of the other provisions of Family Code section 7611, the juvenile court shall determine whether offering the father reunification services will benefit the minor. (Welf. & Inst. Code, § 361.5, subd. (a) [services for biological father].) In making the determinations concerning the father's presumed father status or the minor's best interests, the juvenile court shall consider circumstances as they exist at the time of the new hearing.

SCOTLAND, P.J.

We concur:

RAYE, J.

ROBIE, J.